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337-569—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 983

KENNETH HERBERT HANNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. C) is reported at 404 F. 2d 405. Its initial opinion (Pet. App. A) is reported at 393 F. 2d 700. The opinion of the district court is reported at 260 F. Supp. 430.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1968. A petition for rehearing was denied on December 30, 1968. The petition for a writ of certiorari was filed on January 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person who fraudulently uses an electronic device to gain illegal access to the telephone company's long distance circuits in order to avoid its billing recordation equipment has a statutory or constitutional right to have suppressed evidence obtained by the telephone company's use of a recording device to record automatically the first 35 to 45 seconds of the unauthorized conversation in order to determine whether the fraudulent call was completed, the place where it went and the identity of the caller.

STATUTE INVOLVED

47 U.S.C. 605 provides in pertinent part:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport,

> effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; * * *

STATEMENT

Petitioner was convicted under an indictment returned in the United States District Court for the Southern District of Florida of defrauding the telephone company, in violation of the wire fraud statute, 18 U.S.C. 1343 (count one). He and Nathan Modell were also convicted of wagering by wire in violation of 18 U.S.C. 1084 (count four) and using the telephone in interstate commerce to promote an unlawful activity in violation of 18 U.S.C. 1952 (count five). On December 2, 1966 petitioner was sentenced to six months' imprisonment followed by five years probation on each count, the sentences to run concurrently. He was also fined $10,000 (1 R. 312–313). The court of appeals affirmed.

The sole issue is the legality of the action of the telephone company in using a recording device to record automatically the first 35 to 45 seconds of petitioner's conversations whenever petitioner used an electronic device known as a "blue box" to circumvent the normal automatic toll recording equipment of the telephone company, thereby enabling him to make long-distance telephone calls without paying any of the required charges.

A regularly placed long distance call is fed into a computer (an automatic message accounting machine) which records the telephone number from which the call originates, the number called and the duration of the call, and computes the amount of money due on that particular call (1 R. 52). To avoid having his calls fed into this computer, the user of the "blue box" initially gains access to the telephone circuit by dialing directly the long distance information number in an out of town area—information is a free service which is not billed. He then activates the "blue box" which first emits a 2600 cycle tone that disconnects the number originally dialed and then emits tones that activate the telephone network to connect him to the number he desires. Thus, by use of the "blue box" the caller is able to bypass the accounting machine and gain free use of the telephone circuits (1 R. 35–36).[1]

On November 24, 1965, the New York Office of the Telephone Company notified its Miami subsidiary of the likelihood that a "blue box" was being used on Miami telephone number 945–9723 (1 R. 34, 40). The Miami Office checked its records and found that petitioner was the subscriber to this number. The Miami Security Officer knew that petitioner was reputed to be a bookmaker and that bookmakers commonly used such devices (1. R. 40–41). Thereafter the Telephone Company attached to petitioner's line, at its central office, electronic equipment capable of detecting the

[1] Another electronic device known as the black box may be used at the termination end of the call to make it falsely appear to the toll billing network that a telephone call was never answered (1 R. 37).

abnormal 2600 cycle tone on petitioner's telephone line.[2] Initially this equipment was connected only to a peg counter meter which registered the number of times that petitioner's telephone line emitted a 2600 cycle tone (1 R 42–43, 80–82).

On November 25, after the peg counter meter indicated that petitioner's telephone was emitting 2600 cycle tones (1 R. 43), the telephone company connected to petitioner's line a tape recorder that would be activated whenever petitioner's phone emitted the telltale 2600 cycle tone. The tape recorder operated for a period of 35 to 45 seconds whenever petitioner's telephone line sent forth a 2600 cycle tone, turning off automatically at the expiration of this period. When the tape recorder was activated by the 2600 cycle tone, it recorded the commencement of conversations in petitioner's line. The telephone company was not interested in the contents of the conversation as such but wished to record the dial tones originating at this telephone and to be able to show that a long-distance connection had been established (1 R. 43–44). The detection unit, peg counter and tape recorder remained on petitioner's line sporadically for twenty three days until December 21, 1965 (1 R. 46–48). During this time the tape recorder recorded portions of 100 long dis-

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[2] The Security Manager testified (1 R. 42):

"I must point out that in our toll network the 2600-cycle tone does not originate from a subscriber's phone. It originates from a toll office which is beyond the subscriber's phone. This tone is filtered out as to the subscribed (sic) at all times. When the portable unit is attached to the subscriber's phone, it senses the 2600-cycle tone from the subscriber's telephone."

tance telephone calls placed through the use of a "blue box" (1 R. 158–162). Thereafter, pursuant to subpoena, the telephone company turned over its tapes to a federal grand jury (1 R. 48–51). On January 7, 1966, primarily on the basis of the tapes, federal agents obtained a search warrant for petitioner's home and seized, among other things, a "blue box" (1 R. 90–91, 152, 163, 178–179).

In the district court, petitioner moved to suppress as evidence the tape recordings and the evidence seized under the search warrant on the ground that the recordings violated his rights under 47 U.S.C. 605 and the Fourth Amendment (1 R. 178–179). Following a hearing, the district judge denied this motion. On October 3, 1966, petitioner waived trial by jury and entered into a stipulation admitting the truthfulness of the allegations in counts 1, 4 and 5 of the indictment preserving, however, his right to appeal the ruling on the motion to suppress the evidence (1 R. 131–138).

ARGUMENT

1. Relying on *Katz* v. *United States,* 389 U.S. 347, petitioner contends that his right to privacy was violated when the Telephone Company [3] recorded the conversations in which he participated after fraudulently gaining access to the Telephone Company cir-

[3] We assume for the purpose of argument that the Fourth Amendment could reach purely private action, but see *Burdeau* v. *McDowell,* 256 U.S. 465, because the court below did not consider this issue.

cuits by use of the "blue box".[4] We submit that the underlying premise of petitioner's argument is fallacious.

A trespasser who enters a vacant apartment and sets up residence could hardly complain that his right to privacy was violated if the landlord entered the apartment and found him there. Similarly, while he was using the telephone lines as a trespasser, petitioner had no constitutional right to be protected from endeavors by the Telephone Company to overhear his conversation so that the Company could later prove his fraud and establish its right to payment. To hold otherwise would mean that a thief in a house could complain that his privacy was unconstitutionally invaded when the owner of the house returned and entered without knocking.

Under the Fourth Amendment, a person who legally places a long distance telephone call in a regular manner "is surely entitled to assume that the words he utters in the mouthpiece will not be broadcast to the world." *Katz* v. *United States,* 389 U.S. 347, 352. But, as the court said in *Brandon* v. *United States,* 382 F. 2d 607, 610–611 (C.A. 10):

> "* * * one who directly dials a distant number impliedly agrees that the telephone company may use the means necessary to ascertain where the call originated, the number

[4] It is important to note again that the recorder was activated only when petitioner's phone emitted a 2600 cycle tone and that such tones are not emitted by the subscriber's phone in the normal operation of the telephone system.

> called, and the duration of the conversation, in order that the proper charge may be recorded. * * *"

Petitioner, as a fraudulent user of the telephone service, is, of course, entitled to no greater protection that a normal user of service. He must be deemed to assume the risk that the telephone company would adopt measures to identify the calls, the place where the calls originated, the number called and the duration of the conversation. In addition, since he endeavored to evade the normal billing devices employed by the Telephone Company, it is not unreasonable to say that petitioner assumed the risk that the Company would use a recording device in order to identify the person who made the call and was thus liable to pay the toll.

2. The telephone company's recording of the first 35 to 45 seconds of petitioner's telephone calls whenever he employed a "blue box" to bypass the regular billing equipment did not violate Section 605 of the Communication Act of 1934. The Communications Act does not restrict the telephone company from taking this reasonable action to protect itself against trespassers on its lines.

Congress enacted the Communications Act as a comprehensive plan for the regulation of interstate communication. *Benanti* v. *United States,* 355 U.S. 96, 104. It obligated each carrier to maintain correct and complete accounts and records of the movement of traffic over its facilities and forbade each carrier from giving any preference to any person in its charges. 47 U.S.C. 220, 202, 203. In addition, Congress in the Internal Revenue Code, obligated the telephone com-

pany to collect the federal excise tax upon each long distance call. 26 U.S.C. 4251. The company thus has an affirmative obligation to the public and to the government to endeavor to make certain that fees for telephone calls are accurately billed.

Section 605 which prohibits any person not authorized by the sender to intercept and divulge any telephone communication must be read in light of its purpose which was to protect the integrity of the communications system. *Benanti* v. *United States*, 355 U.S. 96, 100. The obligations that Congress has placed on the telephone company in billing, charges, service and excise taxes all presuppose the regular use of the telephone. The prohibition against interception, therefore, protects only the user who has rightfully gained access to the telephone lines. It should not be interpreted to protect one, who, in direct contravention of the system for equal billing and equal taxation, fraudulently gains access to the long distance circuits and by-passes the billing mechanism of the telephone company. Cf. *United States* v. *Sugden*, 226 F. 2d 281 (C.A. 9), affirmed *per curiam*, 351 U.S. 916. What this Court said in *Rathbun* v. *United States*, 355 U.S. 107, 109, in interpreting this very statute, is likewise applicable here: "Every statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature. * * * That principle would be violated if we attributed to Congress acceptance of the results that would occur here from the position argued by petitioner."

As the court below pointed out, Section 605 recognized that there would be occasions when employees

of the telephone company would necessarily have to know the contents of conversations. The first clause of Section 605, thus, does not proscribe the interception of communications by a person "assisting in receiving * * * or assisting in transmitting" the communications. Developments in electronics have changed the conditions under which it becomes necessary for employees of the telephone company to obtain information. It is, however, evident that Section 605 was not intended to prevent overhearing of telephone company employees in the proper conduct of the company's business. Since here the limited overhearing which occurred was for the proper conduct of company business, there was no violation of Section 605.

When the fraud was discovered, the telephone company properly informed law enforcement authorities of that fact. The fact that after the subpoenas were complied with, the tapes revealed, not only the fraud, but also illegal gambling serves neither to render improper the initial action by the telephone company, nor to bar prosecution for the crimes thus legitimately brought to light.

Bubis v. *United States,* 384 F. 2d 643 (C.A. 9), upon which petitioner relies is not in conflict with the decision below. In that case, the court found a violation of Section 605 because the telephone company monitored and recorded *all* incoming and outgoing calls, fraudulent or otherwise for a period of three months. Here, on the other hand, the Company monitored only the calls which were made by the use of the illegal "blue box" and only for a limited period

of time to identify the voice of the wrongful user and, prior to producing the recordings pursuant to subpoena, the telephone company representatives had advised the government only that they had evidence of toll fraud. Since the activity of the telephone company here did not go beyond that which was necessary to preserve the integrity of the company's operations, there was here no invasion of any legitimate right of privacy.

At all events, however, the question of the applicability of Section 605 to the conduct of the telephone company's agent presented in this case is without any prospective importance. In enacting the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197, 213–214) Congress in Section 802, added § 2511 (2)(a) to Title 18 providing:

> It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

Thus, there can be no question that the conduct of the telephone company officials here would be lawful under the new statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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